IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL MISCELLANEOUS APPLICATION NO. 126 OF 2002.

Shri Savari Muthu I,
r/at CA-1, Eden Woods,
Satismo Wado, Taleigao,
Ilhas Goa. ... Petitioner.

Versus

State. ... Respondent.

Mr. S.D. Lotlikar, Senior Advocate with Mr. A.D. Bhobe, Advocate for the Petitioner.

Mr. S.N. Sardessai, Public Prosecutor for the Respondent State.

Coram: P.V. HARDAS, J.

Date: 6th February 2003.

ORAL JUDGMENT.

By consent of parties, this application is taken up for final disposal at the stage of admission.

2. This is an application under Section 482 of the Code of Criminal Procedure assailing the Judgment passed by the learned Additional Sessions Judge, Panaji, dated 11th July 2002, in Criminal Revision Application No. 53 of 2001, dismissing the revision and ordering framing of charge against the petitioner/accused under Section 381 of the Indian Penal Code.

2A. The facts in brief necessary for the decision of this application are as hereunder:-

A charge-sheet against the present petitioner

was filed by the Ponda Police in respect of offences punishable under Sections 406 and 408 of the Indian Penal Code on the allegation that the petitioner/accused, who was employed by Desai Cement Company Pvt. Ltd., to look after the company secretarial work and management consultant on retainership basis, had dishonestly misappropriated Company's Minutes Book of the meetings of the Board of Directors, the Annual General Meeting and the Register of Member of Director. At the time of framing of the charge, the petitioner/accused had prayed for his discharge. The learned Judicial Magistrate, First Class, Ponda, by his Order, dated 14th August 2001, in Criminal Case No. 89/S/2000/D, discharged the petitioner/accused for offences punishable under Sections 406 and 408 but, directed the framing of charge for an offence punishable under Section 381 of the Indian Penal Code. The learned trial Court held that the accused had taken the said books without the express or implied consent of the informant and had dishonestly retained the same against the will of the informant and, therefore, according to the learned trial Court, the ingredients of the offence of theft under Section 378 of the Indian Penal Code were discernible in the acts of the petitioner/accused. Since, according to the learned trial Court, the petitioner/accused, at the material time, was working as servant of the informant, his acts fell under the ambit of Section 381 of the Indian Penal

Code.

3. The petitioner/accused, being aggrieved by the Order of the learned trial Court, filed Criminal Revision Application No. 53 of 2001, before the Additional Sessions Judge, Panaji. The learned Additional Sessions Judge, by the Judgment, dated 11th July 2002, concurred with the view of the learned trial Court and held that the petitioner/accused had taken the books and had retained the same with the intention of coercing the informant to pay his dues and, this, prima facie, appears to be a dishonest intention under Section 378 of the Indian Penal Code. The learned revisional Court, therefore, while dismissing the revision, held that the learned Magistrate was justified in ordering the framing of charge against the petitioner/accused for an offence under Section 381 of the Indian Penal Code.

4. At the outset Mr. Sardessai, the learned Public Prosecutor appearing on behalf of the respondent State, has stated that the Order framing charge under Section 381 of the Indian Penal Code is not sustainable. However, a charge under Section 379 of the Indian Penal Code can clearly be spelt out against the petitioner/accused.

5. Mr. Lotlikar, the learned senior counsel appearing on behalf of the petitioner/accused, has

invited my attention to the First Information Report, which is dated 31st August 2000. This report came to be lodged by the informant, Mr. S.K. Desai, after nearly 7 to 8 months of the petitioner/accused having taken the said books. In paragraph 3 of the said report (paragraphs are not so numbered) it is stated by the informant that the petitioner/accused was appointed by them as a retainer on monthly fees of Rs. 1,500/-. He was supposed to do secretarial work for the company on regular basis. He was also supposed to advise the company under the company laws and used to write the minute books, share certificate register and Annual General Body meeting minutes. For this he used to visit the Ponda Office whenever meetings took place and was charging separately. (Emphasis supplied). In paragraph 4 it is stated that:- "about 7 to 8 months back the petitioner/accused had taken Directors' minutes register, Annual General Body meeting register and Share Certificate register from our Ponda Office without telling our office staff nor to the undersigned. Subsequently when we wanted these books for reference we found these books were not in the office. We therefore started searching for the same." In paragraph 5 it is stated:- "On enquiry with Mr. Savari Muthu to our surprise we came to know that above books/registers were taken away by him to his office at Panaji. When questioned he told us that as he could not write and

complete certain details in the register at Ponda, he had taken these registers to Panaji as he felt he would return it within 2 days. When we asked him to return those books he told on several occasions over the phone that he requires some time to complete registers. Thereafter we sent our office representatives Mr. Kishore as well as Mr. K.R. Prabhu on several occasions but Mr. Savari Muthu did not hand over our registers to them inspite of repeated visits to him."

6. In the next paragraph it is stated:- "He also started ignoring our calls and was not attending to our work. However every month he used to send his bills. In course of time as he was not attending to his work we felt keeping him on retainership was a waste of money therefore we by our letter dated 22.5.2000 terminated his services." In the same paragraph it is stated:- "Since minutes books and share certificate register was with him we occasionally started reminding him and requested him to complete the minutes and send the register since these registers as per rules must remain in the office."

7. In the next paragraph it is stated:- "Though several times over the telephone he was promising us that he will be completing and sending our registers he did not complete nor returned these registers to us." In

the subsequent paragraphs of the First Information Report it is stated that the petitioner/accused did not hand over the registers and was demanding that his fees be paid and that he would not hand over the registers unless his fees were paid.

8. Mr. Lotlikar, the learned senior counsel appearing for the petitioner/accused, has also invited my attention to the letter, dated 22nd May 2000, which was filed alongwith the charge-sheet. By this letter the retainership of the petitioner/accused was terminated. He was, however, informed that the Company would continue to consult him in future, for which he may send his bills for specific work attended. The petitioner/accused by his letter, dated 27th May 2000, had raised the question of payment of his dues.

9. For an offence of theft, as is defined under Section 378 of the Indian Penal Code, the basic ingredient is the dishonest intention to take any movable property without the consent of the person in whose possession the said property is. Explanation 5 to Section 378 stipulates that the consent may be either expressed or implied. Thus, the essential elements of the offence of theft are (i) that there is a dishonest intention to take the property, (ii) that the property is movable, (iii) that it is taken out of the possession

of a person in whose possession the property is, (iv) that it was taken without the consent of the person in possession of the property and (v) that the property is removed to facilitate the taking of it. Thus, the dishonest intention is the gist of the offence.

10. At the outset it must be stated that the petitioner/accused was a retainer, who was engaged to write the aforesaid books. From the antecedents of the prosecution case, as is reflected from the documents, the petitioner/accused had taken those books with the bonafide belief that he had a right to take the books in order to complete the writing of the said books. In the initial taking there does not appear to be any dishonest intention on the part of the petitioner/accused. When confronted with the taking or removal of the books, it is apparent from the First Information Report itself that the petitioner/accused had stated that he would complete the writing of the books and would return the same. From the First Information Report also it is apparent that the petitioner/accused could not complete the books and return the same immediately. Thus, there is no dishonest intention in taking or removing the books from the office of the complainant Company. The said removal of the books is in the bonafide belief that the accused had a right to take the books in order to complete the same as he had been engaged for the said

purpose. Even the complainant Company in the First Information Report does not state that it had taken any exception to the petitioner/accused taking away the books from the Ponda Office. Thus, there appears to be some element of an implied consent to the petitioner/accused taking away the books in order to complete the same. Also, from the perusal of the complaint, it does not appear that the petitioner/accused had taken away the books in order to coerce the complainant Company in paying his fees. Thus, the initial taking or removal of the books should be with a dishonest intention. The demand for payment of fees appears to be after the complainant Company issued a letter, dated 22nd May 2000, terminating the retainership of the petitioner/accused. The First Information Report has been filed on 31st August 2000 and it is stated therein that the petitioner/accused had taken the books 7 to 8 months prior to the filing of the said Report. Thus, it appears that the petitioner/accused must have taken the books somewhere in January 2000. From January 2000 till 22nd May 2000 there was no coercive demand from the petitioner/accused for the payment of his dues. Thus, even by inference, it cannot be said that the petitioner/accused had taken or removed the books with an intention to coerce the complainant Company to pay his dues.

11. As stated by me earlier, the initial taking or

removing of the books by the petitioner/accused was not with a dishonest intention. At least such a dishonest intention is not spelt out from the First Information Report. When confronted with the taking or removing of the books, even as per the First Information Report, the petitioner/accused stated that he had taken the books as he could not complete the books in the Ponda Office and would return the books shortly.

12. From these circumstances a dishonest intention cannot certainly be spelt out and is even, prima facie, absent. If there is no dishonest intention on the part of the petitioner/accused in taking the books and particularly as he had not taken those books with an intention to coerce the complainant Company in paying his dues, even prima facie, according to me, no offence under Section 378 of the Indian Penal Code is spelt out. Since, on a cursory examination of the First Information Report and the documents attached to the charge-sheet, prima facie, an offence is not disclosed, according to me, therefore, the petitioner/accused should not be made to undergo the rigours of a criminal trial. The petitioner/accused deserves to be discharged for the offence punishable under Section 379 of the Indian Penal Code. The books have ultimately been returned to the informant Company.

13. In respect of an offence punishable under

Section 381 of the Indian Penal Code, there is no material to indicate that the petitioner/accused was employed in the capacity of clerk or a servant. Prima facie, therefore, the offence under Section 381 of the Indian Penal is not made out.

14. In respect of an offence under Section 379 of the Indian Penal Code, I have come to a finding that prima facie no offence is disclosed justifying the petitioner/accused to face a trial.

15. For the aforesaid reasons, this Criminal Miscellaneous Application is allowed. The impugned Orders of the Courts below are, hereby, quashed and set aside and the petitioner/accused is discharged from the Criminal Case No. 89/S/2000/D.

(P.V. HARDAS)
JUDGE.

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